

# Michigan Journal of International Law

---

Volume 26 | Issue 3

---

2005

## Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law

Michael Y. Kieval  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Law Commons](#), and the [National Security Law Commons](#)

---

### Recommended Citation

Michael Y. Kieval, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 MICH. J. INT'L L. 869 (2005).

Available at: <https://repository.law.umich.edu/mjil/vol26/iss3/3>

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## STUDENT NOTE

# BE REASONABLE! THOUGHTS ON THE EFFECTIVENESS OF STATE CRITICISM IN ENFORCING INTERNATIONAL LAW

Michael Y. Kieval\*

I. INTRODUCTION .....	869
II. STATE PRACTICE AND THE TWO BODIES OF INTERNATIONAL LAW .....	871
A. <i>State Practice and Customary International Law</i> .....	872
1. Utility of Custom .....	872
2. Legitimacy from Custom .....	873
B. <i>State Practice and the Legitimacy of International Law in General</i> .....	874
III. INTERNATIONAL LAW AS INCENTIVE .....	876
IV. COUNTERTERRORISM .....	878
A. <i>Ius ad Bellum</i> .....	880
1. Article 51 and the Inherent Right of Self Defense .....	880
2. Responsibility to One's Citizens .....	882
3. Necessity and Proportionality .....	883
B. <i>Ius in Bello</i> .....	884
1. Geneva Conventions .....	884
2. The Essential Command of IHL .....	885
V. ISRAEL .....	886
A. <i>Risking Soldiers' Lives to Protect Foreign Civilians: Jenin</i> .....	889
B. <i>Targeted Killings</i> .....	892
VI. CONCLUSION .....	896

## I. INTRODUCTION

Judge Schwebel, dissenting in *Nicaragua v. United States*, expressed concern that customary international law, as interpreted in that case by the International Court of Justice (ICJ), was not based on state practice,<sup>1</sup> and did not “take account of the realities of the use of force in

---

\* J.D. Candidate, University of Michigan Law School 2005. A.B., *magna cum laude*, Washington University 2002. Many thanks to Ambassador Emilio Cardenas, for whose seminar, Terrorism and International Law, I wrote the paper that became this note. All errors are my own.

1. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 168 at 345 (June 27) (dissenting opinion of Judge Schwebel) [hereinafter *Nicaragua*].

international relations.”<sup>2</sup> His charge that this could “detract” from “the state of the law”<sup>3</sup> invites the question of whether law—particularly customary international law—should be descriptive of practice, or an aspirational attempt to shape it.

Law that is descriptive of practice has the advantage of having people already following it—and it lacks powerful enemies trying to undermine it—and it therefore needs only moderate international cooperation to function as a tool for punishing opportunistic deviation from the international order. On the other hand, by definition, it only induces compliance with the existing norm, not progress toward a better norm. Aspirational law has the positive attribute of trying to make the world a better place, but is hard to implement, because many countries, possibly powerful countries in the international mainstream, must be induced to change their behavior. A law not generally followed may either be a dead letter or an invitation to selective prosecution and suspicions of ulterior motives.<sup>4</sup> With aspirational law, a similar problem arises: Should international law be a set of bright line rules with no exceptions, or should it take cognizance of the difficult situations in which states find themselves?

This Note examines the effectiveness of diplomatic criticism in enforcing international law,<sup>5</sup> particularly in the counter-terrorism (or anti-insurgency) context. It is not concerned with determining what international law does or does not “in fact” allow States to do in combating terrorism and other existential threats.

It first lays out a framework for assessing the effectiveness of different international legal regimes (Part II), and discusses international law’s effectiveness in setting incentives (Part III). It then discusses the challenge of counterterrorism to the prevailing regime (Part IV), and finally applies the framework, by way of illustration, to the case of Israel (Part V). Since international criticism is more important to the enforcement of international law in this sphere than are scholarly (or perhaps even judicial) pronouncements,<sup>6</sup> this section focuses on international law in the diplomatic, rather than adjudicatory, context. The conclusion (Part VI) considers the general applicability of the lessons of the Israeli situation and revisits the descriptive/aspirational dilemma.

---

2. *Id.* para. 155 at 332 (dissenting opinion of Judge Schwebel).

3. *Id.* para. 155 at 332 (dissenting opinion of Judge Schwebel).

4. *See infra* notes 33, 136 and accompanying text.

5. *See* THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 25–26 (1990).

6. Because international criticism is a primary enforcement mechanism. *See, e.g.,* ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 7 (1987) (“social-disapproval factor operates as a sanction”); Beth Stephens, *Conceptualizing Violence Under International Law*, 60 ALB. L. REV. 579, 593 (1997).

## II. STATE PRACTICE AND THE TWO BODIES OF INTERNATIONAL LAW

International law consists of two main bodies: treaty and custom.<sup>7</sup> Treaties' language, which is the basis of their interpretation,<sup>8</sup> is negotiated, and States choose whether to bind themselves to that language. Custom is a more illusory source, based on a "softer" collective consent of States, express or implied.<sup>9</sup> Whereas treaties are interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties,<sup>10</sup> custom is divined by judicial bodies almost as an issue of fact.<sup>11</sup> They also serve two distinct purposes: treaties provide a mechanism for States credibly to commit themselves to a mutually beneficial course of action<sup>12</sup> (like contract law in the private sphere); customary law serves as a basis for policing norms that are not the subject matter of treaties. Treaties, except to the extent that they codify existing custom, represent a departure from custom, a stricter regime, a conscious decision by States to bind themselves to something which is mutually advantageous but not necessarily moral or necessary to the

---

7. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999); see also DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 12–15, 25 (2001) (discussing sources of International Law in the context of the I.C.J. Statute). There are indeed more *sources* of International Law than custom and treaties, but it is useful to divide the law into "oral" and "written" types (custom and treaty), not only because the I.C.J. in *Nicaragua* had to rely on custom divorced from treaty obligations, but also because this is a useful line to draw in most legal systems, between the written law and custom as a gap filler. *Nicaragua*, *supra* note 1, para. 69 at 422–23 (interpreting the United States' multilateral treaty reservation); see also SANFORD LEVINSON, CONSTITUTIONAL FAITH 19 (1988) (discussing constitutional Protestantism and constitutional Catholicism, as regards the role of unwritten law).

8. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 [hereinafter VCLT].

9. See BEDERMAN, *supra* note 7, at 15; see also Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law*, 95 AM. J. INT'L L. 757, 757–59 (2001) (discussing custom as emanating from an uncertain combination of state practice and *opinion juris*, citing various authors). But cf. John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 434 (1997).

10. BEDERMAN, *supra* note 7, at 26; VCLT, *supra* note 8.

11. Custom is "proved" by establishing that a "rule has (1) been followed as a 'general practice,' and (2) has been 'accepted as law.'" BEDERMAN, *supra* note 7, at 15 (quoting the Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060). Anthea Roberts describes two distinct ways that courts may divine custom: the "traditional" method that involves inducing law from actual practice, and the "modern" method that deduces law from statements. Roberts, *supra* note 9, at 758.

12. Treaties can be used for aspirational/signaling purposes as well, by writing them vaguely and without a mandatory dispute resolution clause. See, e.g., The International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). This type of treaty might be better analyzed as a political document than as law, which is not to say that it is not useful in interpreting law.

stability of the international system.<sup>13</sup> Custom, by contrast, inasmuch as it takes its legitimacy from its basis in existing norms, should have no claim to be aspirational.<sup>14</sup> Law whose existence depends upon it reflecting actual, widespread practice cannot require that which is not reflected in actual, widespread practice.<sup>15</sup>

### A. State Practice and Customary International Law

Customary international law takes its unique force from its norm-enforcing nature.<sup>16</sup> Just as the common law's strength is in its reflection of norms that have been tested, customary international law benefits from not needing to be negotiated or drafted,<sup>17</sup> because it evolved in state practice.<sup>18</sup> Additionally, to the extent that people act in accordance with legal dictates, the law is strengthened.<sup>19</sup> Thus, custom's legitimacy and efficacy depends upon its solid basis in state behavior.

#### 1. Utility of Custom

Common law systems' advantage over other legal systems lies in its ability to change,<sup>20</sup> it is true, but also in its firm basis in actual practice, and to the extent it deviates from it, in general recourse to the courts for a variety of disputes so that the law can develop and react, so that it can take reality into account.<sup>21</sup> "Proper" customary international law is a good gap filler<sup>22</sup> because it mandates only policies that have been shown to work in most of the world.<sup>23</sup> Moreover, because *truly* customary prac-

13. See BEDERMAN, *supra* note 7, at 25–30.

14. Under the "traditional" view. See Roberts, *supra* note 9, at 758.

15. This follows logically. Custom, in fact, has sometimes been extended beyond actual state practice. See Roberts, *supra* note 9. To the extent that custom purports to depend on actual state practice, however, this should not happen.

16. See Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 102 (1987). But see Goldsmith & Posner, *supra* note 7, at 1129 ("[M]any apparently cooperative universal behavioral regularities are illusory").

17. Not only for the time and effort it takes to do so, but more importantly for the guaranteed workability which is the natural product of trial and error.

18. See *supra* note 11.

19. Most obviously by adding to the history of consistent state practice, but also to the extent that misbehavior might not be seen to be punished effectively.

20. See Rafael La Porta et al., *The Quality of Government*, 15 J. L. ECON. & ORG. 222 (1999).

21. See Katharina Pistor, *The Standardization of Law and its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 98 (2002) (laws, institutions need "customers").

22. More than a tool for interpretation, which role is played by "General Principles." See BEDERMAN, *supra* note 7, at 13–14; Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 50 Stat. 1055, 1060 [hereinafter I.C.J. Statute].

23. The degree of specificity of customary international law may be an issue, however, as a custom of not engaging in certain activity (even under assuming that it is illegal) in most circumstances does not mean that the activity would be considered illegal in exigent circumstances, as those circumstances may not have been considered. See Carsten Stahn, *Agora*:

tices are already followed in most of the world, the cost of ensuring compliance should be low.<sup>24</sup> In this view, custom functions as a deterrent to certain opportunistic behavior, not as a way to impose values that, as a result of not enjoying international consensus, are not the subject of treaties.<sup>25</sup> Customary law, like common law, loses its unique efficacy when the rules it imposes are based on abstract principles, instead of coming from established norms.<sup>26</sup>

## 2. Legitimacy from Custom

That which is widely-enough accepted to be practiced by almost all nations is easy to justify as law.<sup>27</sup> Bans on practices, however, which, while commanding universal negative lip service, are widespread, do not reflect practice, lack legitimacy as law and may weaken the international legal system by raising the specter of selective prosecution and by making States less likely to agree to jurisdiction over international disputes in general.<sup>28</sup>

---

*Future Implication of the Iraq Conflict: Enforcement of the Collective Will After Iraq*, 97 AM. J. INT'L L. 804, 819 (2003) (suggesting that principled differentiation after the fact among uses of force could be applied to humanitarian interventions and serve as a means of gradually reforming International Law on the use of force). Likewise, other states may have intended a complete ban to which the state in question would not have agreed because it was the only one likely to face such circumstances. This is not unthinkable since International Law is rife with standards that are deliberately targeted at one or two countries. See Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169 *passim* (2003) (describing the role of NGOs in shaping the Rome Statute to target Israel and the Additional Protocols to the Geneva Convention to make it harder for South Africa and Israel to defend themselves); see also *infra* Part V.

24. The cost is lower because noncompliance is the exception, arising out of discrete incidents of opportunism, rather than consistent, ingrained practices. Cf. Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture and the Rule of Law*, 37 HARV. INT'L L.J. 3, 40 (1996) ("In highly relational contexts, which are characterized by complex and undefined obligations, judicial enforcement of general legal principles to fill gaps in incomplete contracts and to punish opportunism may be the most important function of law.") (emphasis in original).

25. The process by which treaties come to embody custom (as in *North Sea Continental Shelf*) is properly understood to stem from the near-universal acceptance of the treaty, and although it may seem intellectually dishonest to proceed as the ICJ did in *Nicaragua*, judging on the basis of custom where a treaty (which for jurisdictional reasons could not be applied) clearly controlled, it is not difficult to imagine that a long-standing nearly-universally accepted treaty (in practice as well as in name) could at some point bind non-parties as customary international law. See Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 81 (1996) ("[T]he determination of consensus among the states of the world has much to do with the formation of customary law from treaty provisions . . .").

26. See *supra* notes 20, 21, and accompanying text.

27. This is because few will protest and because state practice is a legitimate source of law. See *supra* note 11.

28. If a country suspects that a dispute resolution body will use custom to impose aspirational norms on it, and if reservations are interpreted so as to be circumventable, then that

Judge Schwebel's dissent in *Nicaragua* suggested, as discussed above,<sup>29</sup> that international law might be harmed to the extent it did not comport to practice.<sup>30</sup> Legitimacy is doubly important in a system with few means of compulsion,<sup>31</sup> and because a principal means of adjudication, the ICJ, is not mandatory, a skewed system of custom may impact treaty law as well, by decreasing the number of States that agree to the court's compulsory jurisdiction.<sup>32</sup>

### B. State Practice and the Legitimacy of International Law in General

Laws that are not enforced across the board lose legitimacy as those instances in which they *are* enforced are seen to be marred by political considerations.<sup>33</sup> The difficulty in international law of enforcing laws across the board, caused by weak grounds of jurisdiction<sup>34</sup> and by both structural limitations and geopolitical considerations,<sup>35</sup> makes more important the reflection of existing state conduct in international law in general, not just in customary law.<sup>36</sup> To the extent that law reflects practice, it does not suffer from this crisis of legitimacy.<sup>37</sup> Thus, international legal regimes should have ease of enforcement, and its cousin, likelihood of compliance, in mind.<sup>38</sup>

---

country may not agree to jurisdiction at all. See Richard Falk, *Appraisals of Nicaragua v. United States: The World Court's Achievement*, 81 AM. J. INT'L. L. 106, 107-08 (1987). Despite the barely-disguised hopes of some, jurisdiction still requires state consent in most international contexts. See I.C.J. Statute, *supra* note 22, art. 36 (allowing treaties to refer matters for jurisdiction, and providing procedure for voluntary election of compulsory jurisdiction). Cf. BEDERMAN, *supra* note 7, at 20.

29. *Supra* Part I.

30. *Nicaragua*, *supra* note 1.

31. See FRANCK, *supra* note 5 *passim*.

32. States may also be tempted to explicitly exclude all custom from adjudications under their treaties, which would turn International Law into private, rather than public, law. See Falk, *supra* note 28.

33. This argument has its origin in domestic legal discourse and is particularly relevant to the debate on racial profiling in the United States. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1118-19 (2000) (Racial profiling and selective prosecution undermine the legitimacy "of all laws and all officials.").

34. See BEDERMAN, *supra* note 7, at 241-46.

35. Structural limitations include the veto power of permanent members of the U.N. Security Council. U.N. CHARTER art. 27(3). Geopolitical considerations include not wanting to anger Pakistan, an ally in the hunt for al Qaida, with charges of human rights violations. See Christopher Marquis, *For Allies, 'I Do' Becomes 'Hey, Want to Dance?'*, N.Y. TIMES, April 14, 2002, § 4 at 5.

36. See *supra* note 24.

37. See *supra* note 27.

38. One wonders whether compunctions over the Nuremberg Trials, in which people were charged with violating laws that had not clearly been in existence (in any meaningful way) when they acted (or at least were not deemed capable of individual criminal enforce-

Even if existing state practice is too much of a limitation for treaty-based international law, likelihood of compliance should be taken into account, or at least its proxy in our model, reasonableness of compliance.<sup>39</sup> That is, a country should not have to refrain from defending itself in order to comply with international law.<sup>40</sup> The ICJ recognized the inherent conflict between reality and literal application of aspirational norms in the *Nuclear Weapons Advisory Opinion*.<sup>41</sup> There, affirming the principle that one may not threaten to do that which it is prohibited to do,<sup>42</sup> the court nonetheless maneuvered out of declaring a ban on the threat of use of nuclear weapons, despite the threat of mutually assured destruction, which is problematic with respect to International Humanitarian Law (IHL).<sup>43</sup> The court recognized the “policy of deterrence” that was central to international relations and found a way to avoid literalist interpretations and refrain from issuing an advisory opinion that not only might well have been ignored by all nuclear States,<sup>44</sup> but could also, if actually complied with by some, have undone the global balance, resulting in humanitarian catastrophe.<sup>45</sup>

---

ment), has led to the practice of banning everything, even without a useful enforcement mechanism, all in the name of notice.

39. Even reasonableness may not always be appropriate. Even if one agrees with Mark Bowden that some torture is a good thing, the only way to keep that slippery slope leading to a Stasi prison is to ban all torture, even though some will continue, perhaps even hoping that some will continue. Mark Bowden, *The Dark Art of Interrogation*, 292(3) ATLANTIC MONTHLY 51 (Oct. 2003), available at <http://www.theatlantic.com/issues/2003/10/bowden.htm>; see generally, TORTURE: A COLLECTION (Sanford Levinson ed., 2004) (collection of essays discussing the acceptability of torture in extreme circumstances and the risk that legitimizing it at all could leave it uncontrollable). Sometimes making restrictions mutually binding is the whole point (as opposed to merely codifying an existing norm), such as bans on specific munitions. E.g., Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800.

40. One could scarcely imagine that a risk-averse proto-nation, choosing from behind a Rawlesian veil, would choose the international legal interpretation of today's Europe. See JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971). Even if she did, putting a country into such a predicament would probably lead to her violating the international legal rule at issue, giving up the opportunity in that case to moderate her behavior (assuming that a more limited rule would confer some of the international public benefit of the stricter rule). This is not to say that the law does not effect the state's deliberations, merely that it does not end up changing the outcome in this case. Cf. LOUIS HENKIN, HOW NATIONS BEHAVE 44 (1979) (International Law influences state behavior by deterring violations).

41. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (I.C.J. advisory opinion responding to General Assembly request) [hereinafter *Nuclear Weapons Advisory Opinion*].

42. *Id.* at 246.

43. *Id.* at 256–60.

44. See Liz Heffernan, *The Nuclear Weapons Opinions: Reflections on the Advisory Procedure of the International Court of Justice*, 28 STETSON L. REV. 133, 169 (1998) (even compromise opinion rendered may be ignored by the members of the Security Council).

45. See *Nuclear Weapons Advisory Opinion*, *supra* note 41, at 830 ¶ 96. It also would have provided the Third World yet another rhetorical club with which to beat the West. Cf.



### III. INTERNATIONAL LAW AS INCENTIVE

International law, whether customary or treaty-based, acts by imposing costs on States for deviating from legal norms.<sup>46</sup> States change their behavior when the addition of these costs makes the total cost of acting higher than the benefit<sup>47</sup> (which is equal to the cost of not acting).<sup>48</sup> If the costs imposed by the legal system were equal to the social cost of the behavior at issue, this would cause the acting state to internalize the external costs of its actions, leading to socially optimal behavior,<sup>49</sup> which could well involve breaking the law.<sup>50</sup> For that reason, it may be optimal to prohibit categories of activity across the board, even if sometimes it will be socially optimal for them to be practiced,<sup>51</sup> simply in order that the acting State internalize the costs of its actions.<sup>52</sup> If the costs imposed by the legal system are not in proportion to the external costs of potential state action, however, there is the potential for over- or under-deterrence.<sup>53</sup>

Given the relative weakness of international pressure in the face of grave threats to a nation's peace or security,<sup>54</sup> it is likely that the external costs will never be fully internalized.<sup>55</sup> One might be tempted, therefore,

HENKIN, *supra* note 40, at 120 (United States and the West principal targets of Third World). The I.C.J. also acknowledged that use of nuclear weapons might be legal for a state facing annihilation. Nuclear Weapons Advisory Opinion, *supra* note 41, at 263 ¶¶ 96–97.

46. See HENKIN, *supra* note 40, at 44–45.

47. *Id.*

48. See definition of “opportunity cost,” “opportunity” def. 11, OXFORD ENGLISH DICTIONARY ONLINE, at <http://dictionary.oed.com> (“the loss of other alternatives when one alternative is chosen”).

49. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347, 348 (1967) (explaining externalities and the reasons for causing them to be internalized).

50. Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEGAL STUD. 463, 479 (1996) (some offenses have negative net social value, but others’ optimal level “cannot be zero”).

51. See *supra* note 39 (discussing torture as one such category).

52. See Demsetz, *supra* note 49, at 348.

53. See Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 237 (2000) (“The economic theory of punishment in general . . . is designed to ensure optimal deterrence of private and public misconduct.”).

54. See David J. Scheffer, *Recent Books on International Law: Review Essay: Delusions About Leadership, Terrorism, and War*, 97 AM. J. INT’L L. 209, 213 (2003) (“The sharper edges of international law may need to be sanded down in order to protect the national security and to defend a democratic way of life.”); see also Daniel Rothenberg, *What We Have Seen Has Been Terrible: Public Presentational Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 479 (2003) (“[T]he Guatemalan state committed itself to combating the insurgency and defending its national security with little regard for international law.”).

55. See, e.g., Fred Weir, *Russia Escalates its Air War*, CHRISTIAN SCI. MONITOR, Sept. 28, 1999, at 1 (as many as 300 Chechen civilians dead); Peter Ford, *Surveys Pointing to High Civilian Death Toll in Iraq*, CHRISTIAN SCI. MONITOR, May 22, 2003, at 1; see also Scott

to argue for always imposing the largest cost possible for each legal violation, on the grounds that it would cause the acting State to internalize more of the external costs of the actions. This would be a mistake,<sup>56</sup> for if a State were choosing among possible reactions to a pressing threat,<sup>57</sup> and it would receive the same rebuke for each, then state criticism under International law will play no role in its decision-making process.<sup>58</sup>

Imagine a hypothetical State that faces two equally effective choices, A and B, in responding to a pressing threat. A is more costly to the State in terms of resources and soldiers killed, but results in fewer civilian casualties. B would harm far more civilians, but involves projecting force from afar, with a lower cost to the State in both money and soldiers' lives. If other countries will condemn either action equally,<sup>59</sup> then the State will choose whichever option, A or B, serves its own, domestic purposes. If, on the other hand, other countries condemn B but not A, or condemn B in more serious terms than A,<sup>60</sup> then if the difference between diplomatically-imposed costs to the State of A and B is at least as great as the difference in internal costs between the two, the State will choose A and more civilians will be protected.<sup>61</sup>

If the international community wants to influence state behavior with its rules, so as to minimize civilian suffering, it should be careful, lest the objects of its ire perceive a no-win situation, lest they choose to ignore an undifferentiated international chorus that is all sticks and no carrots. The *relative* costs imposed on States for the various options from among which they choose is as important as the *degree* of those costs.<sup>62</sup>

---

Baldauf, *Afghan Violence Snares Civilians*, CHRISTIAN SCI. MONITOR, August 21, 2003, at 6 (guerrilla attacks kill more than 90, most civilians, in 10 days).

56. Assuming that the cost imposed is always the same, the result of the level of official criticism, rather than a function of the degree of harm caused by the particular action, the criticism serving primarily to publicize said action. If this is not the case, then publicity alone should serve the same purpose, without the need for "legal" pronouncements.

57. That is, a threat pressing enough that the maximum available "penalty" would not deter the best (from the state's point of view) of the possible reactions.

58. If the cost incurred is the same for each option, the state will be indifferent as to which act it is penalized for, *ceteris paribus*.

59. That is, if the condemnations of each action impose roughly the same cost on the State. I assume for purposes of this hypothetical that State knows the reaction other states will have to each course of action. While this knowledge may not be as exact in the real world, the deterrent power of state criticism depends on its existing to some degree.

60. Imposing a higher cost on the State if it chooses B than A.

61. Even though the State did not fully internalize the costs of its actions; here, one can see that it is the *relative* cost that matters; *see also* text accompanying note 70, *infra*, on protecting civilians as the imperative of IHL.

62. If it is the difference in costs that will tip a State's behavior, then the least objectionable option should not have any cost imposed on it at all. On the contrary, a benefit may be conferred on the State that chooses that option, making the spread between it and the alternatives even larger.

## IV. COUNTERTERRORISM

Of much current interest in international law<sup>63</sup> are the challenges in applying *iura ad bellum et in bello* to the new class of low-intensity state-party-optional warfare.<sup>64</sup> Although these bodies of law predate global non-state actors, the application of *ius ad bellum*—at least as it concerns attacks on terrorist organizations and their property (even if in the territory of a State not directly supporting them)—to counterterrorism seems logical enough. Non-state actors that “declare war” on States should not complain when these declarations have their intended effect.<sup>65</sup> States that are unable (or unwilling) to control terrorist activity within their borders may complain when their borders are breached, but nobody listens.<sup>66</sup> The inherent right of self defense would be meaningless if one could not defend against non-state attackers.<sup>67</sup> Moreover, it would be perverse indeed for a legal system designed by and for States to allow States to attack other States, but not to attack non-state entities.<sup>68</sup> Generally, States will not stand idly by as their citizens are attacked, whether by another State or by a non-state aggressor.<sup>69</sup>

---

63. See, e.g., Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); Alan Dershowitz, *Tortured Reasoning*, in *TORTURE: A COLLECTION* 257 (Levinson ed., 2004); David A. Westbrook, *Law Through War*, 48 BUFF. L. REV. 299 (2000).

64. Low intensity war is nothing new, but efforts to protect non-state actors engaged in them are both new and controversial. See Rabkin, *supra* note 23, *passim*.

65. Cf. *Ford v. Douglas*, 46 U.S. 143, \*15 (1847) (“The maxim in equity is, a complainant must come into the court with clean hands.”). But see discussion of Hamas, Part V.B, *infra*.

66. There was widespread condemnation of Israel for having violated Ugandan sovereignty by rescuing hostages that were being held with the tacit approval of Idi Amin. Paul Fauteux, *La Pratique du Droit Relatif au Maintien de la Paix et de la Sécurité Internationales*, 47 REVUE DU BARREAU 644–46 (1987) (“Au Conseil de sécurité la situation était apparue relativement claire . . . [mais] un seul membre du Conseil appuya sur le fond la position juridique israélienne[;] tous les autres jugeant que le raid était illegal ou évitant de se prononcer sur les aspects juridiques de l’affaire.”) (citation omitted). Since then, the international consciousness has changed (or has at least responded differently to similar American behavior), with criticism limited to those who themselves harbor terrorists and whose territory is therefore the site of occasional counterterrorist military incursions. See, e.g., *Syria’s President Hits at Attacks by US on Afghanistan*, FINANCIAL TIMES, Nov. 1, 2001, USA Ed. 1, at 1.

67. Cf. John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT’L L. 135, 137 (1987) (“[P]rimary rules” on the use of force and self-defense “must be intrinsically compelling” or else “such rules would begin to offend the rough intuitions of responsible politicians—who are concerned for the physical safety of their own countries . . . as to what kinds of principles they can live with.”).

68. This may be precisely the goal of parts of the “Third World,” at least with regard to “wars of liberation.” See TASK FORCE ON INTERNATIONAL TERRORISM, INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 2 (2003) [hereinafter IBA Report].

69. See Hargrove, *supra* note 67, at 137. Israel’s inaction in the face of Scud missile attacks from Iraq in the first Gulf War is a notable exception. It resulted from pressure from

The restrictions of *ius in bello*, however, have an important role to play in counterterrorism, mainly because its principle, to limit suffering,<sup>70</sup> applies regardless of the reason for the conflict or the identity of the players;<sup>71</sup> where a legal criticism under *ius ad bellum* demeans the justice of a State's cause<sup>72</sup> ("You have no right to fight over this!"), a criticism under *ius in bello* contains a different admonition<sup>73</sup> ("Do not let unacceptable means pervert or cloud your just ends!"). As a minimum standard of conduct that reaffirms the humanity of state actors, rather than, as *ius ad bellum*, one that reflects an agreement whose utility lies in its mutuality, *ius in bello* should be applied to all conflicts, even conflicts with entities that do not follow it.<sup>74</sup> Moreover, given the pointlessness of trying to maintain an erstwhile "peace" when an armed attack is already underway (as would be the purpose of applying overly formal interpretations of *ius ad bellum* based on state/non-state distinctions), international law should focus its energy where it will be more effective, that is on influencing the conduct of nations in the course of wars that cannot be prevented.<sup>75</sup>

---

Washington, which alone might not have been enough, but for the Coalition's bombardment of Iraq, which made Israeli retaliation superfluous. There are those who believe, however, that in so doing, Israel lost deterrence. See Harvey Morris, *Israel Might Refuse to Stay out of War on Iraq*, FINANCIAL TIMES, Sept. 21, 2002, London Ed., at 7.

70. See IBA Report, *supra* note 68, at 91 n.1 (preventing suffering is principle purpose of IHL); Anne Marie Slaughter & William W. Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 2 (2002) (Art. 2(4) "articulates a principle of civilian inviolability.").

71. The specific rules, of course, do depend on the circumstances of the conflict, as with the requirement that non-military combatants differentiate themselves from the civilian population, Third Geneva Convention, art. 4(A)(2), but even this distinction is in furtherance of the main purpose, preventing suffering, particularly among civilians.

72. See JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 182 (3d ed. 2003).

73. See *id.* at 183.

74. See Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 7 [hereinafter Geneva IV] ("No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."). Since the restrictions are not contractual in nature, they do not depend on reciprocity.

75. It has been argued that constraining states' forceful responses to terrorism will force them to "resolve the root causes leading to terrorism," but this is fanciful. See Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 600 (1989). First, states are not constrained because international rules on the use of force have no teeth (especially compared with the power of domestic demands for security). See Falk, *supra* note 28, at 108 (noting "absence of any prospect of enforcement"). Second, root causes are not always easy to identify or to remove. See Shashi Tharoor, *September 11, 2002: Understanding and Defeating Terrorism, One Year Later*, 27 FLETCHER F. WORLD AFF. 9, 11 (2003) (denying "simplistic explanations for the root causes of terrorism," but acknowledging the role played by "the scourges of poverty, of famine, of illiteracy, of ill-health, of injustice, and of human insecurity"). Third, it is not clear that having people ready to kill and terrorize for a cause makes that cause legitimate. If one were restrained in the way he could

### A. *Ius ad Bellum*

The ICJ's results-oriented exegesis of "armed attack" in *Nicaragua* notwithstanding,<sup>76</sup> it is generally agreed that countries have the right to defend themselves, regardless of the identity of the perpetrator.<sup>77</sup> Even when the Security Council authorizes military intervention, a country's resistance to that action at its borders would presumably not be termed "aggression."<sup>78</sup> Moreover, international law stands to lose legitimacy (and therefore efficacy as well)<sup>79</sup> if it condemns as technically illegal, acts of self-defense that are considered imperative for national preservation in domestic discourse and that are viewed sympathetically in otherwise disinterested parts of the world.<sup>80</sup> Use of *ius ad bellum* to restrain any but the most reaching reprisals may by weakening the law as a whole, cripple it in the important arena of *ius in bello*.<sup>81</sup>

#### 1. Article 51 and the Inherent Right of Self Defense

The basic principle of modern international law respecting the use of force is taken from Article 2(4) of the United Nations Charter.<sup>82</sup> Article 2(4) binds all U.N. Members to resolve disputes peacefully and without resort to the threat or use of force. This is an idealistic rule that works well when everyone follows it.<sup>83</sup> There is, however, a safety net, a right of self defense that allows the use of force against States that cheat.<sup>84</sup>

act against a berserker who demanded his daughter and his property, there would be an increase in berserker demands unless people stopped having daughters and property! See THE SAGA OF GISLI, ch.1 at 1 (1963).

76. *Nicaragua*, *supra* note 1.

77. In fact, the doctrine of necessity and proportionality in self-defense came out of the *Caroline* case, in which non-state actors aided insurgents across international boundaries. See John Bassett Moore, *The CAROLINE Incident*, 2 DIG. OF INT'L L. 412 (1906) (cited in BEDERMAN, *supra* note 7, at 214 n.1).

78. Aggression generally requires cross-border action. See G.A. Res. 3314, U.N. GAOR, 6th Comm., 29th Sess., No. 86, at 1, U.N. Doc. A/9890 (1975). The definition's catch-all, however, could in theory be used to term such self-defense aggression. *Id.* at art. 1 ("or in any other manner inconsistent . . .").

79. FRANCK, *supra* note 5, at 3 (legitimacy induces compliance).

80. That is, States might not see such criticism as legitimate. See *id.*, *passim*.

81. See discussion of voluntary submission to jurisdiction accompanying note 28, *supra*, and note 104, *infra*.

82. U.N. CHARTER art. 2(4); BEDERMAN, *supra* note 7, at 214-15.

83. The idea at the time, of course, was to bind all States to follow it. See IBA Report, *supra* note 68, at 15. Since then, a greater (though not unrelated) threat to international stability than opportunistic state actors has emerged—perhaps testament to the success of the U.N. system. See *id.*

84. U.N. CHARTER art. 51. The right is described as "inherent," which may mean either that it had to be included in the Charter but not that it extends beyond interpretations of article 51, or that its existence, while mentioned in the Charter, is independent and must be interpreted without reference to documents of man-made, as opposed to natural law.

This strategic decision, which takes reality into account and does not try to turn the U.N. Charter into a "suicide pact," must be upheld in jurisprudence if international law is to function as anything more than a political battleground.<sup>85</sup> Terrorists are the ultimate cheaters in the international game<sup>86</sup> and they should not be permitted to hold the world in a giant Guantanamo prison, a legal limbo in which the law says they cannot be reached.<sup>87</sup> Moreover, it may be argued that the inclusion of the right of self-defense in the U.N. Charter, even in the aftermath of a war so horrific that nations might have been persuaded to sign on without it, reflects the awareness that in the future, a State would be attacked and would defend itself, the text of Article 2(4) notwithstanding.<sup>88</sup> If the U.N. Charter was to be something more than an ode to idealistic international relations, it would have to take account of the extent to which that state's actions could be influenced,<sup>89</sup> and also of the probable reaction of other countries if they saw the international legal system condemning actions

---

In the name of the "overall spirit" of the Charter, which is to promote peace, there has been a tendency to use the U.N. in order to constrain the use of force without addressing its frequent 'root cause,' namely the indirect use of force by others. See Charlotte Ku, *When Can Nations Go to War?*, 24 MICH. J. INT'L L. 1077, 1078 (2003) ("[T]he U.N. Charter system as a means to restrain the use of force has perhaps developed more fully than the Charter system's ability to authorize and to enable states to use force in situations other than a clear cross border invasion of a member state.") (emphasis in original).

85. See *supra* Part IV.A.; see also George Schultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, 25 I.L.M. 204 (1986) (January 15 address of the Secretary of State) ("The UN Charter is not a suicide pact."); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963) ("The powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact. Similarly, Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs. Latitude in this area is necessary to ensure effectuation of this indispensable function of government.") (emphasis added, footnotes omitted). Louis Rene Beres has also used the phrase "suicide pact" in this context. Louis Rene Beres, *Palestinian Atrocities, Israeli Retaliations and the Laws of War*, ISRAEL INSIDER, Mar. 11, 2002 ("International law is not a suicide pact."), available at <http://www.israelinsider.com/views/authors/beres.htm>.

86. See discussion *infra* accompanying notes 121–130.

87. The United States argued that the detention center at Guantanamo Bay was a legal limbo where U.S. courts could not venture. Rasul v. Bush, Brief of Respondents, 2003 U.S. Briefs 334, \*9–\*10 (March 3, 2004).

88. See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L. L. 259, 265 (1989) (States justify their actions in terms of art. 51, but its effect on their actions is uncertain).

Article 2(4) reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4).

89. An international legal system with teeth could well encourage a state to refrain from defending itself, analogously to Israel when it was attacked during the first Gulf War. See discussion *supra* note 69.

they felt were justified.<sup>90</sup> The legitimacy of international law depends on its being enforced and on the reasonableness of its dictates.<sup>91</sup> Telling countries to turn the other cheek or replacing self-defense with General Assembly resolutions, seems unlikely to further that aim.<sup>92</sup>

## 2. Responsibility to One's Citizens

Democratic States exist in order to solve collective action problems and improve the welfare of their citizens.<sup>93</sup> They monopolize the use of force to some extent, and they promise peace and security in return. Part of the responsibility inherent in a monopoly on violence is the obligation to protect one's citizens.<sup>94</sup> The extent to which this obligation may be derogated from in advance, through the familiar contract/treaty notion of pre-commitment, is debatable.<sup>95</sup> In any event, for this analysis, the most relevant point is that a healthy democratic country has in place a system of political and social institutions that compel the leadership to act to protect the citizenry.<sup>96</sup> If this is the case, then international law, which in the public sphere is mainly a foil of legitimacy for parties to wield,<sup>97</sup>

---

90. The reaction of a country to mistreatment of a peer country is one thing; international scapegoating of a unique state, however, is another matter entirely. See Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us:" *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 195 (1994) ("[I]t is difficult to measure the degree to which condemnations of Israeli and U.S. actions have been based on the nature of the acts, and the degree to which such condemnations have been based on the nature of the actors themselves. During much of the Cold War period, both Israel and the United States were fairly regularly attacked in international fora. It would seem likely, therefore, that geopolitical and ideological considerations informed at least some international criticism of counter-terrorist operations in addition to strictly legal concerns.") (emphasis in original).

91. See FRANCK, *supra* note 5.

92. Some think that G.A. resolutions are useful. See, e.g., Alain Pellet, *Book Review: Bruno Simma et al. eds., The Charter of the United Nations: A Commentary*, 25 MICH. J. INT'L L. 135, 144 (2003) (chastising the General Assembly for its silence after the U.S.-led invasion of Iraq in 2003).

93. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 98-102 (1971).

94. See, e.g., Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 232-33 (2001).

95. See *supra* Part IV.A, discussing inherent right of self defense. In any event, it is doubtful if a previous generation can be held to have signed away a later generation's right to exist (the later generation certainly cannot be seen to have knowingly ratified this arrangement). Cf. RAWLS, *supra* note 40. Yet, this is exactly the situation that would obtain if international law were permitted to be interpreted as a suicide pact, banning self-defense in the face of terrorism. Cf. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (at least in sphere of immigration, government cannot bind itself irrevocably).

96. See Alfred P. Rubin, *Legal Responses to Terror: An International Criminal Court?*, 43 HARV. INT'L L.J. 65, 68-69 (2002) (pointing out the seeming incongruity in punishing the head of state for actions which were to some extent dictated by domestic political forces).

97. See Schachter, *supra* note 88, at 263 (community judgment enforces rules on the use of force).

would in denying self-defense in this instance stand in opposition to the practice of States and become about as persuasive as quoting *Corinthians* to the Taliban.

### 3. Necessity and Proportionality

Since, as discussed above, States must have the ability to defend themselves, even from unconventional threats, most of the work in applying *ius ad bellum* to counterterrorism, to the extent we are bound by rubrics rather than abstract principles,<sup>98</sup> must be done by the principles of necessity and proportionality.<sup>99</sup>

The question, then, is how to apportion the burden of proof between the party asserting self-defense (the defending state) and those who challenge its claim.<sup>100</sup> The structure of the U.N. Charter, where Article 51 constitutes in essence an affirmative defense to violations of Article 2(4),<sup>101</sup> may best be interpreted as placing the burden on the defending State, especially in light of the requirement that it notify the Security Council of its actions.<sup>102</sup> A more broad view of the institutional context of the U.N. Charter, however, taking into account the lack of an enforcement mechanism other than Security Council action,<sup>103</sup> may commend a different reading. To the extent that countries did not agree to ICJ or other jurisdiction over claims of self-defense,<sup>104</sup> it may be argued that they were not really agreeing to an allocation of the burden of proof, but rather were agreeing to a general principle and counting on a procedural nullity. Self-defense, like many international legal principles, is principally a legitimating ground for defending ones actions in the

---

98. See *infra* Part V. They are not bad principles, incorporating, as they do, a balancing standard. They can be misapplied, however, by framing the choice as that governing the smallest possible action-unit, rather than an overall military strike.

99. *Supra* note 77, (*Caroline* case establishing these principles).

100. See, generally, Sara N. Scheideman, Note, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249 (2000).

101. Analogous to violations of various GATT provisions which are excused in accordance with Article XX. See Robert Housman & Paul Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement*, 8 AM. U.J. INT'L L. & POL'Y 719, 745 n.121 (1993).

102. U.N. CHARTER art. 51.

103. Which is unlikely in conflicts involving any of the Security Council's permanent members (or their clients).

104. As with the Vandenberg Reservation at issue in *Nicaragua* (61 Stat. 1218, reservation (c) (1947)). Moreover, as the decision in *Nicaragua* showed, I.C.J. opinions can be both political and results-oriented. On supreme courts as political institutions, see, generally, Gad Barzilai, *The Center Against the Periphery: The Law of "Terror Prevention" as Politics* (Hebrew), 8 PELILIM 229 (1999); Eitan Barak, *Under Cover of Darkness: The Israeli Supreme Court and the Use of Human Lives as "Bargaining Chips,"* 3 INT'L J. HUM. RTS. 1 (1999).



diplomatic arena,<sup>105</sup> which means that there is no fact-finder whom the defending State must satisfy—rather, there is a community of nations which will pretend to believe or disbelieve it based on geopolitical considerations.<sup>106</sup>

### B. *Ius in Bello*

There are two types of moral standard: that applied within the moral community,<sup>107</sup> whatever its delimitation, which is based on reciprocity and centers on the effect on others of one's actions, and that applied more-or-less universally, which is based on the actor's humanity, more on what the action says about him than on its effect on others.<sup>108</sup> This latter, universal morality, is behind those who would guarantee basic human protections to terrorists, even if not applying technical protections of the Geneva Conventions (such as conferring status as prisoners of war).<sup>109</sup>

When applying any provision of IHL to anti-terror campaigns, it is important to call attention to the reason behind the protection. Good reasons may help convince well-meaning States to abide by the most important restrictions and will outflank the objection that counterterrorism is different.<sup>110</sup>

### 1. Geneva Conventions

If one is concerned with making sure that those caught up in an anti-terror dragnet are guilty, then there is reason to apply rules of due process. If one is concerned that a moral State ought not torture human beings (or animals, for that matter), then enforcing humane treatment of prisoners in all circumstances makes sense. If one is concerned with upholding the letter of international agreements written in the aftermath of other types of war, however, then it must be asked what is to be gained

---

105. See *supra* note 97. This is natural for the charter of an organization that is essentially diplomatic and not judicial.

106. See *supra* note 97.

107. Terrorists are generally considered outside the moral community, even if the groups from which they arise are or were within it. Cf. Barzilai, *supra* note 104, at 248 ("terror prevention" used to marginalize otherwise legitimate political discourse).

108. See Brian Barry & Matt Matravers, *Justice, international*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (1998) (comparing international justice to domestic justice on the basis of the extent of the moral community) at <http://www.rep.routledge.com/>.

109. See IBA Report, *supra* note 68, at 96 (Guantanamo prisoners to be treated humanely); *id.* at 91–92 (reluctance of some, including United States, to extend IHL protections to terrorists who do not obey them).

110. See IBA Report, *supra* note 68, at 91 (countries tempted not to apply IHL to terrorists).

from their strict application here.<sup>111</sup> By the same logic, if a conflict in which terror is used is marked by mutual respect of certain principles, such as the humane or respectful treatment of prisoners, then it would behoove States to conform to such norms, even if a correct reading of the Conventions would not require them to do so.

States must not be allowed to avoid important international legal constraints by arguing that the Conventions do not imagine a modern global terrorist threat and accordingly, do too much to curtail effective action against it,<sup>112</sup> because that would eviscerate humanitarian protections. Rather, by tailoring the rules to the reasonable needs of threatened States, international law can dodge this attack and continue to be an important force for minimizing human suffering in war.

## 2. The Essential Command of IHL

The purposes of IHL are: (1) to prevent suffering;<sup>113</sup> and (2) to make all players in the international game better off by mutually agreeing to limit war to certain bounds.<sup>114</sup> Where reciprocity is nonexistent, we are left with preventing suffering as IHL's *raison d'être*. There are two facets of preventing unnecessary suffering. One is preventing certain levels of suffering in all (or almost all) cases, which is why torture is unacceptable.<sup>115</sup> This applies specifically to the guilty, to unlawful combatants, to those who do not abide by the same rules. The other is preventing any suffering of non-combatants,<sup>116</sup> which is more like a due process, protection of the innocent concern.

Too often, this essential command is either pushed aside by literalists or, even worse, applied only to one group of civilians, ignoring

---

111. There may be much to gain, if one is convinced that in the absence of strict rules there are no real protections. Relying on strict legal interpretation, rather than on moral and policy considerations, will lead to gaps in coverage, as in the Palestinian territories, to which the Conventions, by their terms, do not apply. Geneva Convention IV, *supra* note 74, art. 2; Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 262–65 (1971); *see also* Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 294 (Laws of belligerent occupation that assume existence of another legitimate sovereign do not apply to West Bank.). *But see* Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 68 (2003).

112. *See* Memorandum from Alberto R. Gonzales, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*, to the President 2 (Jan. 25, 2002) ("In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges . . .") *available at* <http://msnbc.msn.com/id/4999148/>.

113. *See supra* note 70.

114. *See supra* Part II (discussing treaties as contracts).

115. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113, 24 I.L.M. 535 (1985).

116. Geneva IV, *supra* note 74.

another.<sup>117</sup> In addition, countries, motivated by strategic or political interests, may choose the argument that they feel most limits their adversaries' behavior. If the effect is that some defending States hear criticism with which they cannot comply, presented as international law, the world will lose the opportunity to use the law to influence their behavior so as to prevent suffering.<sup>118</sup>

## V. ISRAEL

Israel, threatened continuously by terrorist attacks,<sup>119</sup> has been beset by hostile violence since before its inception.<sup>120</sup> Attacks have violated international law in many ways: using children not merely as soldiers but as "martyrs,"<sup>121</sup> deliberately targeting civilians,<sup>122</sup> manufacturing weapons to cause both maximum destruction and maximum suffering,<sup>123</sup> as by the inclusion of nails,<sup>124</sup> screws,<sup>125</sup> and anticoagulants;<sup>126</sup> using ambulances to smuggle explosives;<sup>127</sup> using Palestinian civilians as human shields;<sup>128</sup> using violence to derail peace negotiations rather than in self-defense;<sup>129</sup> and most sinisterly, having "ethnic cleansing" as a goal.<sup>130</sup>

117. See Asa Kasher, *Those Who Cry with One Eye*, HAARETZ ENG. ED., Feb. 29, 2004 (chastising both sides of Israeli-Palestinian Conflict for 'crying with one eye'), available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=399254>.

118. See *supra* Section II (discussing international legal criticism as a means of imposing costs on undesirable state behavior).

119. See Press Release, Isr. Ministry of Foreign Affairs, *Victims of Palestinian Violence and Terrorism Since September 2000* (official Israeli government list of victims of Palestinian violence, with date, place and cause of death), at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims%20of%20Palestinian%20Violence%20and%20Terrorism%20sinc.htm> (accessed 2/3/05).

120. See, e.g., *Tel Hay*, ENCYCLOPAEDIA BRITANNICA ONLINE, at <http://search.eb.com/eb/article?tocId=9071571> (village sacked in 1920, leaving 6 Jews dead); *Hebron*, ENCYCLOPAEDIA BRITANNICA ONLINE, at <http://search.eb.com/eb/article?tocId=9039765> (last visited Mar. 26, 2005) (67 massacred in Hebron in 1929).

121. Justus Weiner, *The Use of Palestinian Children in the al-Aqsa Intifada: A Legal and Political Analysis*, 16 TEMP. INT'L & COMP. L.J. 43, 51-52 (2002).

122. Clyde Haberman, *At least 14 dead as suicide bomber strikes Jerusalem*, N.Y. TIMES, Aug. 10, 2001, at A1.

123. *Id.*

124. *Id.*

125. Greg Myre, *Gaza Mother, 22, Kills Four Israelis in Suicide Bombing*, N.Y. TIMES, Jan. 15, 2004, at A3.

126. Ian Fisher, *For Israelis Wounded in Bomb Attacks, Recovery Is a Battle*, N.Y. TIMES, July 8, 2002, at A6.

127. Serge Schemann, *Mideast Turmoil*, N.Y. TIMES, April 12, 2002, at A1.

128. See Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State against Terrorism?*, 16 EMORY INT'L L. REV. 445 (2002); cf. Geneva Convention IV, *supra* note 74, art. 28 ("The presence of a protected person may not be used to render certain points or areas immune from military operations.").

129. Serge Schemann, *Israel-P.L.O. Deal Reported on 1998 West Bank Pullout, Easing Way to Hebron Pact*, N.Y. TIMES, January 13, 1997, at A1.

130. See Mark D. Allison, Note, *The Hamas Deportation: Israel's Response to Terrorism During the Middle East Peace Process*, 10 AM. U.J. INT'L L. & POL'Y 397, 416 (1994).

Israel, as a State founded in the aftermath, and in part by survivors, of the Holocaust,<sup>131</sup> has morality as a substantial part of its consciousness.<sup>132</sup> As a State continually faced with existential threats,<sup>133</sup> however, it has often taken a somewhat limited view of the moral obligations of a State towards its enemies and towards its adversaries.<sup>134</sup> Given the extent to which international legal “rules” have been drafted by its enemies, Israel’s blind acceptance of those “rules” could be hazardous.<sup>135</sup> If one extends those “rules” to include criticism by “human rights” organizations<sup>136</sup> and European States,<sup>137</sup> the situation is even worse.

Israel’s army, often criticized,<sup>138</sup> is subject to moral constraints as severe as any other army facing terrorist threats.<sup>139</sup> Its morality, however, is

131. *Israel*, ENCYCLOPAEDIA BRITANNICA ONLINE, at <http://search.eb.com/eb/article?tocId=9106444>.

132. Shamgar, *supra* note 111, at 277 (Israeli Attorney General—later Chief Justice—wrote, “we do not content ourselves with the norms followed by others”); *Israel* at 56, JERUSALEM POST, Apr. 25, 2004, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull%26cid=1082891657204> (“Our greatest success—however ironically, given the way we have been vilified—is not material but moral.”); see also Kasher, *supra* note 117 (“The State of Israel, as a democracy, has the duty to provide its citizens with effective protection of their lives and must give expression to human dignity of all human beings, even if they are strangers or hostile.”).

133. See James Bennett, *Mideast Balance Sheet*, N.Y. TIMES, Mar. 12, 2002, at A1 (“In a fight combining a terror campaign with a guerrilla war, some Palestinian groups, such as Hamas and Islamic Jihad, are out to destroy the state of Israel.”); *World Briefing*, N.Y. TIMES, Jan. 1, 2000, at A16 (“Ayatollah Ali Khamenei, [Iran’s] supreme leader, called for the destruction of Israel . . .”).

134. See Meron Benvenisti, *Still Shooting and Crying*, HAARETZ ENG. ED., Mar. 12, 2004, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=403928> (arguing that military ethical codes are “intended to cloak a brutal, cynical and manipulative system in a mantle of respectability,” by promoting a false dichotomy between the moral choices an army makes and the political dictates it is given). I do not suggest that Israelis have never committed atrocities, as some did, for instance, at Deir Yassin in 1948. See L. Carla Brown, *State of Grace? Rethinking Israel’s Founding Myths*, 77 FOREIGN AFF. 90 (1998). In fact, some unacceptable behavior (which probably does not rise to atrocities) certainly continues. See *Activists Say Border Police Held Boy, 13, as Human Shield*, HAARETZ ENG. ED., April 23, 2004 (stone thrower apprehended and tied to hood of Jeep as punishment/protection from other stone throwers), available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=418705>.

135. See Rabkin, *supra* note 23, at 758 (First Additional Protocol drafted in part by PLO and ANC and directed at Israel and South Africa).

136. The United Nations Commission on Human Rights (UNCHR) spends much of its time criticizing Israel, ignoring other, more serious human rights situations in the world. Anne F. Bayefsky, *Israel and the United Nations’ Human Rights Agenda: The Inequality of Nations Large and Small*, 29 ISRAEL L. REV. 424, *passim* (1995); see also Amnon Rubinstein, *The Counterfeit Human Rights Industry*, HAARETZ ENG. ED., Mar. 21, 2004 (“Nobody protests against the fence that Saudi Arabia is building on its border with Yemen—against international agreements and harming thousands of shepherds whose flocks graze on the lands were [sic] the fence is going up, but there is no organization that does not protest against Israel.”), available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=406813>.

137. See *infra* notes 202–203.

138. See *infra* Section V.A.

139. See *Implementation of International Humanitarian Law at the National Level with Special Reference to Developments of Modern Warfare: National Report Israel*, 28 REVUE DE

for the most part Utilitarian and not Kantian, which may be part of the reason for international criticism of it.<sup>140</sup>

Having been the punching bag of the cold war<sup>141</sup> and of Arab frustration,<sup>142</sup> but no less committed to morality and to its goal of being "a light unto the nations," Israel has looked inward for standards of conduct and moral judgment.<sup>143</sup> Far from the crude bombing campaigns of Russia in Chechnya,<sup>144</sup> or the massacre at Hama in Syria,<sup>145</sup> Israel has sought to balance its need for security against the suffering of Palestinians.<sup>146</sup>

Presumably, foreign countries' goal in criticizing Israel is to promote "better" conduct by imposing a cost on allegedly illegal activity.<sup>147</sup> If this

DROIT MILITAIRE ET DE DROIT DE LA GUERRE 217, 219 (1989) ("A soldier who does not comply or is even negligent in complying" with the Geneva Conventions, which are part of a standing IDF order, "is liable to imprisonment."); *id.* at 226 (detailing the role of legal advisors prior to military action and on the ground during combat); *but cf.* Barak, *supra* note 104, *passim* (condemning the political decision of the Israeli Supreme Court to allow the government to use hostages taken by security forces as bargaining chips).

140. For an interesting comparative philosophical analysis of counterterrorism in Israel and its relation to international law, see Gross, *supra* note 128, *passim* (arguing that rule of law is the moral rubric by which any action of a democratic state must be judged). It has also been suggested that criticism of Israel is a salve for guilty Europeans who seek to mitigate their continent's behavior in the Holocaust by saying, "look at the Jews; when they are in power, they act just as we did." See, e.g., Eric Yoffie, *Build Coalitions of Decency to Fight Hatred*, FORWARD (Eng.), Nov. 14, 2003 ("And in Europe, which bears the mark of Cain for its complicity in the Holocaust, the Arab-Israeli conflict has become a means of absolving guilt. In turning the Israelis from victims into Nazis, they seek to cleanse their consciences by casting their sins upon us.").

141. Beck & Arend, *supra* note 90, at 195.

142. See *id.*

143. See *supra* note 132.

144. See Jonathan S. Landay, *Chechnya Bomb Threaten U.S.-Russia 'Engagement'*, CHRISTIAN SCI. MONITOR, Sept. 30, 1999, at 2; Michael Wines, *In the Remains of Grozny, the Remains of Living*, N.Y. TIMES Dec. 4, 2001, at A3.

145. See John Kifner, *Syria Said to Raze Part of Rebel City*, N.Y. TIMES, Feb. 21, 1982, at A1 ("Casualties put in thousands").

146. See H.C. 2056/04, Beit Sourik Village Council v. Government of Israel (ordering change to route of West Bank security barrier to alleviate Palestinian suffering, even though new route admittedly not as good); see also Tuvia Blumenthal, *Targeted Killings Can Save Lives*, HAARETZ ENG. ED., Mar. 16, 2004 ("[W]hen the subject is the ethical code of an army, and in particular an army that is waging a prolonged war against terror, it is not possible to evade cold calculations and considerations, not when there are dead and wounded on both sides of the equation.").

147. See *supra* Part III. Arab states would not fall in this group, to the extent their involvement was intended solely to support the Palestinian national cause, regardless of Israeli security policy. Also, some anti-Israel sentiment in Europe borders on the pathological, and is divorced from the situation on the ground. Claude Lanzmann, *Les Délires de la Haine anti-Israélienne*, LE MONDE, May 10, 2002, at 1. One should also consider, however, the obligation that states have to "ensure respect for" certain international legal instruments. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 71, art. 1.

Sometimes, when Israel makes an argument in its defense, it is described as tricky or clever. International condemnation of Palestinian terrorist attacks must be the result of Israel's sophisticated P.R. machine. A French journalist observed that Palestinian lies are simple and

criticism is seen by Israel (or other countries) as either not being based in law, or imposing broad prohibitions that do not recognize efforts to comply within the constraints of critical national interest, then the effect of this criticism could be to weaken the authority and legitimacy of international law and to leave human rights conditions in the territories to Israeli judgment alone.<sup>148</sup> It is not clear, however, if this in fact occurs.

#### A. Risking Soldiers' Lives to Protect Foreign Civilians: Jenin

In April of 2002, as part of Operation Defensive Shield, the Israeli Army (IDF) cornered hostile armed men in the Jenin refugee camp.<sup>149</sup>

---

easy to pierce, while Israeli lies are "much cleverer, more sophisticated." Toine van Teeffele, *Israelis Better at Manipulating Media*, Dec. 8, 2003, available at <http://english.aljazeera.net/NR/exeres/0944B35C-4811-4F44-88EF-F96684DF85F7.htm>. More specific to the current conflict is the assertion that Israel is omnipotent and could stop terrorist attacks without hurting Palestinian civilians if it wanted to do so. Clues to this are found throughout transcripts of interviews with victims of Israeli military actions, painting Israeli soldiers as all-powerful sadists. See, e.g., *Report of the Secretary General Prepared Pursuant to General Assembly Resolution ES-10/10 (Jenin Report)*, July 30, 2002, U.N. Doc. no. A/ES-10/186 (2002), reprinted in 41 I.L.M. 1444, 1464 (2002) [hereinafter *Jenin Report*] ("The Israeli occupying forces had complete and detailed knowledge of what was happening in the camp through the use of drones and cameras attached to balloons that monitored the situation, indicating complete control of the situation by the commanders and that none of the atrocities committed were unintentional.") (emphasis added); *id.* at 1463 (alleging those killed were first captured); *id.* at 1468–70, *Jordanian Note Verbale* (detailing total personal control over even the most pathetic characters, including control over bodily functions); *id.* at 1471 (alleges soldiers shot a man "even though he had not kept them waiting"); *id.* at 1472 (child killed by direct hit of shell, turned completely into a cinder; "Clearly, those operations were planned in advance with the aim of wiping out men, women, children and buildings, in other words, all living creatures and anything that could remain standing."); *id.* at 1473 ("They were not satisfied with destroying our houses; they also placed mines everywhere, so that our lives are constantly threatened," essentially a charge that the IDF sought to control every aspect of Palestinians lives even after withdrawal). In fact, houses had been mined by Palestinians to kill Israeli soldiers. See James Bone, *Palestinians Share Jenin Blame, UN Finds*, *TIMES* (London), Aug. 2, 2002; see also James Bennet & John Kifner, *Israel Presses on with Attacks, Focusing on Northern West Bank*, *N.Y. TIMES*, Apr. 7, 2002, at A1 ("Palestinians [in Nablus] say they have rigged the narrow streets and tunnels of the casbah with bombs and booby traps.")

There may be several reasons for these charges. One is simply a hyperbolic attempt to establish personal and state responsibility. Also, it may be a salve to Arab honor to characterize Israel, whom the Arabs have not vanquished, as endowed with almost supernatural abilities. This, in fact, was a part of Israeli deterrence until the first Gulf War. See *supra* note 69. Whatever the reason, however, it is helpful to remember that, as shown above, there is more behind many of the charges leveled against Israel than fact or law, and this fact should serve to caution us against considering Israel a typical case.

As this Note went to press, international (particularly European) criticism of Israel decreased markedly, coinciding with the improved situation in Israel/Palestine following Arafat's death and an extreme decrease in terrorist attacks. This suggests that the purpose of international criticism may not have been to enforce the law, but rather to force a return to the negotiating table.

148. See *supra* Part III; see also FRANCK, *supra* note 5.

149. See *Jenin Report*, *supra* note 147, at 1453–56; Matthew Guttman, *Reserves of Strength*, *JERUSALEM POST*, Apr. 12, 2002, at B1.

Jenin had produced some twenty-three successful suicide bombers, as well as several others apprehended before striking, out of approximately 100 bombers who had struck since the beginning of violence in the fall of 2000.<sup>150</sup> Although formally a refugee camp, the Jenin camp had become an integrated part of the city and, according to Israel, had been turned into an armed terrorist base.<sup>151</sup> In stark contrast to the Russian Air Force's leveling of Grozny,<sup>152</sup> Israel eschewed air force bombing and instead sent reserve infantry to fight from house to house, so as to minimize civilian casualties.<sup>153</sup> This despite the fact that Israel placed responsibility for the danger to Palestinian civilians on the gunmen who perfidiously based themselves in a refugee camp and even used the United Nations Relief and Works Agency (UNRWA) building as a firing base.<sup>154</sup> Fifty-two Palestinians, many of them armed combatants, and twenty-three Israeli soldiers were killed during the fighting.<sup>155</sup> Early in the assault, Palestinian officials began to charge that a massacre was taking place in Jenin<sup>156</sup> and that hundreds of Palestinians had been killed.<sup>157</sup> The Security Council approved the Secretary General's initiative to send a fact-finding mission to Jenin,<sup>158</sup> which never occurred because of a dispute with Israel over its mission and composition.<sup>159</sup> The General Assembly passed Resolution ES-10/10,<sup>160</sup> requesting a report from the

150. Press Release, Isr. Ministry of Foreign Affairs, *Suicide Bombers from Jenin* (July 2, 2002) (originally released April 24, 2002), available at <http://www.mfa.gov.il/>.

151. Alan Baker, Legal Advisor of the Ministry of Foreign Affairs, Briefing (Apr. 24, 2002) available at <http://www.mfa.gov.il/> [hereinafter *Baker Briefing*].

152. See sources cited *supra* note 144; see also IBA Report, *supra* note 68, at 92 note 5 (detailing several countries' alleged violations of IHL in counterinsurgencies).

153. Asaf Haim, *I Couldn't Stand the Lies*, MAARIV, Apr. 22, 2002 (trans. Isr. Ministry of Foreign Affairs) available at <http://www.mfa.gov.il/> [hereinafter *Zangen*].

154. See *Baker Briefing*, *supra* note 151.

155. *Jenin Report*, *supra* note 147, at 1453.

156. Interview with Ahmad Qurei, President, Palestinian Legislative Council, (Al-Jazeera television broadcast, Apr. 11, 2002) ("The massacre is bigger than can be described, and the victims are more than can be counted, and the destruction is more than can be recorded.").

157. See *Jenin Report*, *supra* note 147, at 1465 (alleging massacre and blaming lack of evidence on "attempts to move bodies").

158. S.C. Res. 1405, U.N. SCOR, 57th Sess., 4516th mtg., U.N. Doc. S/RES/1405 (2002) ("Concerned by the dire humanitarian situation of the Palestinian civilian population, in particular reports from the Jenin refugee camp of an unknown number of deaths and destruction") (emphasis in original).

159. See *Baker Briefing*, *supra* note 151 (reflecting delay of committee due to ongoing disagreement as to terms); Suzanne Goldenberg, *Israel Blocks U.N. Mission to Jenin*, THE GUARDIAN, Apr. 24, 2002, at 1.

160. This resolution bore the conclusory title, "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory." U.N. GAOR, 10th emergency spec. sess., Agenda Item 5, U.N. Doc. A/RES/ES-10/10 (2002) ("Gravely concerned in particular at the reports of grave breaches of international humanitarian law committed in the Jenin refugee camp and other Palestinian cities by the Israeli occupying forces...") (emphasis

Secretary General. The Secretary General's report confirmed what everyone knew by then,<sup>161</sup> that no massacre had taken place.<sup>162</sup>

Israel had tried to apply the fundamental message of IHL,<sup>163</sup> using infantry in place of air power<sup>164</sup> and not firing indiscriminately,<sup>165</sup> and suffered substantial loss of life.<sup>166</sup> Having done this, and perceiving an enemy whose fighters used human shields from among their own people,<sup>167</sup> who engaged in perfidy,<sup>168</sup> and whose method of warfare focused on the deliberate killing of civilians,<sup>169</sup> Israel was charged with atrocities.<sup>170</sup> If one examines from Israel's point of view its options, in the face of a hive of terrorist activity, deliberately placed among the most vulnerable civilians (who, even if they supported the terrorists' activities, presumably did not ask to be used as human shields), in the face of numerous terrorist attacks<sup>171</sup> and in the face of the collapse of the Oslo regime,<sup>172</sup> one wonders what more could have been done. Israel was shocked at the disregard the world showed for the moral conduct of its soldiers,<sup>173</sup> at the allegations,<sup>174</sup> and at the willingness of so many to

---

in original). The General Assembly has not always been friendly toward Israel. See, e.g., G.A. Res. 3379, U.N. GAOR, 30th sess., supp. No. 34, at 83-84, U.N. Doc. A/RES/3379 (1975) (repealed 1991) (equating Zionism with racism).

161. Matthew Guttman, *Human Rights Watch: No Evidence of Massacre in Jenin*, JERUSALEM POST, Apr. 28, 2002, at 2 (quoting Peter Bouckaert, senior researcher for Human Rights Watch); Sharon Sadeh, *How Jenin Battle Became a 'Massacre'*, GUARDIAN, May 6, 2002, at 7. The Annexes to the Report, however, particularly that of Jordan, contain horrific allegations, some explainable as error, others pure fantasy. This was not a case, as the famous Boston Massacre was, of undisputed facts being overemphasized. Atrocities were alleged; they simply had not occurred.

162. *Jenin Report*, *supra* note 147, at 1455 ¶ 56; see also Press Release, Isr. Ministry of Foreign Affairs, *Israel's Reaction to the UN Secretary General's Report on Jenin* (Aug. 1, 2002), available at <http://www.mfa.gov.il/> (expressing gratification at having been vindicated and promising examination of related humanitarian concerns).

163. See *supra* Part IV.B.2.

164. See Guttman, *supra* note 149.

165. *Id.*

166. See Zangen, *supra* note 153; *Jenin Report*, *supra* note 147, at 1455 ¶ 58.

167. See *Baker Briefing*, *supra* note 151 (stating that the Palestinian gunmen had turned the refugee camp "into an armed terrorist encampment").

168. *Id.*

169. Haberman, *supra* note 122.

170. See *Jenin Report*, *supra* note 147, Annexes 1,3,4.

171. See *Suicide Bombers*, *supra* note 150.

172. Judith Miller, *Yasir Arafat, Palestinian Leader and Mideast Provocateur, Is Dead at 75*, N.Y. TIMES, Nov. 12, 2004, at C10.

173. Zangen, *supra* note 153.

174. U.N. envoy Terje Roed-Larsen, a friend of Arafat's and the husband of Norway's ambassador to Israel, toured Jenin and described the scene as the worst disaster he and his men had ever seen, and proclaimed on the basis of the scene that Israel had lost its moral legitimacy. Michael Freund, *Terje's Act of Larseny*, JERUSALEM POST, Apr. 24, 2002, at 8, available at <http://www.upjf.org/documents/showthread.php?s=&threadid=1165> (accessed



believe them.<sup>175</sup> Given Israel's predisposition to look inward for its moral basis,<sup>176</sup> however, and in light of its history of being singled out in the international "legal" arena,<sup>177</sup> the effect of these allegations on Israel's behavior is not clear.

### B. Targeted Killings

In the first days of the so-called Al-Aqsa Intifada, as children and youths were throwing stones and Molotov cocktails at Israeli soldiers guarding roads and checkpoints,<sup>178</sup> gunmen stood behind the children and fired at the soldiers.<sup>179</sup> In the ensuing fire, children were often hit.<sup>180</sup> What were the soldiers to do to protect themselves so that they could continue to man the checkpoints that were supposed to keep suicide bombers from Israeli cities?<sup>181</sup> Snipers were posted near likely flashpoints,<sup>182</sup> to shoot the gunmen while avoiding the children who seemingly willingly shielded them.<sup>183</sup> Palestinians charged that this was illegal, inhumane, extrajudicial killing.<sup>184</sup> Israel sees the subtext to be a demand that it roll over and play dead.<sup>185</sup>

Like snipers shooting gunmen who hide behind children, targeted killings of terrorists are low-intensity urban warfare's version of a military strike on a purely military target.<sup>186</sup> Terrorists, whether foot-soldiers

---

4/19/05); BBC News, *Jenin Camp 'Horrific Beyond Belief'* (Apr. 18, 2002), available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/1937387.stm](http://news.bbc.co.uk/1/hi/world/middle_east/1937387.stm).

175. See, e.g., Zangen, *supra* note 153 (eyewitness account of Israeli doctor who treated both Israelis and Palestinians, both sick and injured, and came forward in anger in light of the accusations).

176. See *supra* note 132.

177. See *supra* note 136.

178. Weiner, *supra* note 121, at 51; Thomas L. Friedman, Editorial, *Ritual Sacrifice*, N.Y. TIMES, Oct. 31, 2000, at A27.

179. Weiner, *supra* note 121, at 51–52.

180. *Id.* at 44, 51.

181. See Isabel Kershner, *The Fence Mender*, JERUSALEM REP., Apr. 19, 2004, at 20.

182. Arie O'Sullivan, *Following Palestinian Live Fire: IDF Starts Using Heavier Weapons*, JERUSALEM POST, Oct. 2, 2000, at 3.

183. Weiner, *supra* note 121, at 51–52.

184. Ze'ev Schiff, *Israel is Not Allowed to Defend Itself*, HAARETZ ENG., Apr. 7, 2004, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=413074>. Snipers, which should be the darling of IHL because they generally cause no collateral damage, are vilified in public discourse, perhaps because they are so effective. The United States has also been criticized for using snipers. See Randa Takiiedine, *Where are the Arabs?*, DAR AL HAYAT ENG., Apr. 21, 2004 ("In Iraq, the American army went as far as using snipers; just like militias and pirates do."), available at <http://english.daralhayat.com/OPED/04-2004/Article-20040421-0e6524bc-c0a8-01ed-0029-bea310603e74/story.html>.

185. Schiff, *supra* note 184.

186. On targeted killings generally, see Orna Ben-Naftali & Iceren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233 (2003).

prepared to blow themselves up, or perverse pied pipers who send youths to kill themselves along with women and children, should be treated no better than combatants,<sup>187</sup> legitimate targets under the laws of war.<sup>188</sup> Targeted killing hits those necessary, legitimate targets, while minimizing civilian casualties.<sup>189</sup> While prohibited in peacetime (as a denial of due process),<sup>190</sup> however, they must also be viewed as a viable alternative to, or mitigation of, measures that cause collective suffering.<sup>191</sup>

In early 2004, Israeli Prime Minister Ariel Sharon announced a plan to evacuate all Jewish settlements in Gaza and also to withdraw IDF soldiers from the strip.<sup>192</sup> Sheikh Ahmed Yassin, founder of Hamas, a terrorist organization dedicated to Israel's destruction<sup>193</sup> that is also a welfare agency, painted Israel's withdrawal as a victory for terrorism, reminiscent of the way that Hizbullah capitalized on Israel's withdrawal

---

187. See Alfred-Maurice de Zayas, *Combatants*, in *ENCYCLOPEDIA OF PUB. INT'L L.* 668 (1992) (combatants are those privileged to engage in armed conflict).

188. As opposed to civilians.

189. The assassination of Shehadeh is an exception, in which a miscalculation resulted in damage to neighboring buildings and a relatively high number of civilian casualties. See James Bennet, *A Hamas Chieftain Dies When Israelis Attack His Home*, N.Y. TIMES, July 23, 2002, at A1. This section is about assassination generally, not about the level of acceptable collateral death, and is not a defense of the Shehadeh assassination.

190. See Brenda L. Godfrey, Note, *Authorization to Kill Terrorist Leaders and Those who Harbor Them: An International Analysis of Defensive Assassination*, 4 SAN DIEGO INT'L L.J. 491, 493 (2003) (discussing due process implications of targeting terrorist leaders).

191. Palestinian activists are fond of referring to closures and checkpoints as "collective punishment." See, e.g., *Arafat Gives Thanks for Japan's Aid*, JIJ PRESS TICKER SERVICE, Sept. 12, 1996. The checkpoints and closures are not "collective punishment," since they are imposed for preventative rather than punitive purposes. See Hans-Heinrich Jescheck, *Collective Punishment*, in *ENCYCLOPEDIA OF PUB. INT'L L.* 645 (1992) (defining collective punishment as "a punitive sanction[s]"). They do cause suffering to innocent people, however. See Richard Bernstein, *Sharon Threatens to Impose Split on Palestinians*, N.Y. TIMES, Dec. 19, 2003, at A20 ("mounting criticism in Israel that the government's security policies have caused suffering among the Palestinians"). House demolitions are more accurately termed collective punishment, though a case can be made that they are meant to neutralize financial incentives to commit terrorist acts. See Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative, *The Legality of House Demolitions Under International Humanitarian Law* (2004), available at <http://www.ihlresearch.org/opt/pdfs/briefing3403.pdf>. In any event, house demolitions are the topic of many other papers, but not of this one. See, e.g., Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 BROOKLYN J. INT'L L. 871 (2003); Shane Darcy, *Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel*, 21 PENN. ST. INT'L L. REV. 477 (2003); Emanuel Gross, *Democracy's Struggle Against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area*, 30 GA. J. INT'L & COMP. L. 165 (2002).

192. See James Bennet, *Shift on Settlements: Sharon's 'Painful' Course*, N.Y. TIMES, Feb. 4, 2004, at A6.

193. See Bennett, *supra* note 133, at A1.

from southern Lebanon.<sup>194</sup> Not content to strike with words, Yassin ordered a spate of terrorist attacks, to underscore the Israeli withdrawal under fire, including an attack at the port of Ashdod that killed several people.<sup>195</sup> Israel fired a missile from a helicopter, hitting Yassin's car in the street in Gaza City and killing him.<sup>196</sup> His replacement at the head of Hamas, Abdel-Aziz Rantisi, promised large-scale terrorist attacks<sup>197</sup> and may have sought help from Hizbullah and Iran towards that end.<sup>198</sup> Israel killed him as well.<sup>199</sup> Time will tell whether Hamas is weakened, whether attacks are thwarted.<sup>200</sup>

The international response was deafening. In the wake of Yassin's killing,<sup>201</sup> Israel was hit with condemnation from every corner.<sup>202</sup> Perhaps most galling to Israel, however, were the statements that termed the assassination "terror."<sup>203</sup> Even the United States condemned the killing,

194. See Aluf Benn, *Yassin: Israel Fleeing Gaza, its Attempts to Crush Hamas Failed*, HAARETZ ENG. ED., Mar. 17, 2004.

195. See James Bennet, *Suicide Bombers Kill 10 in Israel, and Derail Prime Ministers' Talks*, N.Y. TIMES, Mar. 15, 2004, at A1.

196. James Bennet, *Leader of Hamas Killed by Missile in Israeli Strike*, N.Y. TIMES, Mar. 22, 2004, at A1.

197. See *Abdel-Aziz al-Rantissi*, TIMES (London), Apr. 19, 2004, Features, at 25.

198. Alex Fishman, *Its Leaders Liquidated, Hamas Looks to Tehran for Guidance on Terror*, FORWARD, Apr. 21, 2004, available at <http://www.forward.com/main/article.php?ref=fishman200404211119>.

199. Greg Myre, *Leader of Hamas Killed by Israel in Missile Attack*, N.Y. TIMES, Apr. 18, 2004, at A1.

200. See Bradley Burston, *Hamas' Clock: The Pressure for a Bloodbath*, HAARETZ ENG. ED., Apr. 7, 2004, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=413334> (explaining Sharon's 'gambit' as putting pressure on Hamas to respond and not letting it respond and thereby weakening its standing among Palestinians together with its ability to kill). Many also expressed the opinion that while the hit was not illegal, it was a bad idea, likely to cause more attacks. See, e.g., David Horowitz, Editorial, *But Was it Wise?*, JERUSALEM REP., Apr. 19, 2004, at 3 (worrying also about rising anti-Semitism, especially if Hamas attacked United States in retaliation); see also Reuven Pedatzur, *Sniping at Morality*, HAARETZ ENG. ED., Mar. 19, 2004 (warning that assassination policy is "further slide down the moral slope") available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=406446>. As this Note goes to press, it appears that Hamas has either been weakened or induced to change its behavior, whether as a result of the killing of Yassin and Rantisi, or the decreased support for attacks against civilians following Arafat's death, or some combination of the two.

201. In stark contrast to the relative quiet that greeted Russia's assassination of Dzhokhar Dudayev, the Chechen leader, whom the Russian army found by tracking the phone on which he was trying to negotiate a cease-fire. See Robert A. Pape, Editorial, *A Surgical Strike that Could Backfire*, N.Y. TIMES, Apr. 27, 1996, at 23 (citing trickery).

202. *Britain, France Condemn Killing* (Reuters), N.Y. TIMES, March 22, 2004, available at <http://www.nytimes.com/2004/03/22/international/middleeast/22WIRE-REAX.html>; *La Commission des Droits de l'Homme de l'ONU Condamne Israël*, LE MONDE, Mar. 24, 2004 ("La texte 'condamne vigoureusement les graves violations des droits de l'homme dans les territoires palestiniens occupés, en contradiction avec la IVe Convention de Genève.'").

203. The European Parliament and the Government of Turkey both accused Israel of terrorism/acts of terror in connection with the execution. Sharon Sadeh, *IDF Actions that*

although it pursues an identical policy with regard to the al Qaeda leadership (and without any meaningful consideration of collateral civilian casualties).<sup>204</sup>

Lest one think that Yassin was particularly pitiable because he used a wheelchair, Rantisi's assassination, coming on the heels of his publicly threatening terrorist attacks<sup>205</sup> (that there should be no doubt of his military as opposed to purely political role), was met with a similar response, perhaps compounded this time by resentment that foreign outrage had not changed Israeli policy.<sup>206</sup> In addition to the questionable international

---

*Harm Civilians Akin to 'Acts of Terror,'* HAARETZ ENG. ED., Apr. 2, 2004, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=411538>; *Turkey Says Yassin Assassination Was an Act of Terror* (News Agencies), HAARETZ ENG. ED., Mar. 25, 2004, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=408757>. But see Johannes Gerster, *A Double Standard in the War on Terror*, HAARETZ ENG. ED., Apr. 1, 2004, available at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=411076>. Defining terrorism/terror is controversial. See IBA Report, *supra* note 68, at 2; Robert A. Friedlander, *Terrorism*, ENCYCLOPEDIA OF PUB. INTERNATIONAL LAW 845 (vol. 4); Thilo Marauhn, *Addendum 1999*, *id.* at 849. Britannica defines terrorism as: "the systematic use of violence to create a general climate of fear in a population and thereby to bring about a particular political objective." *Terrorism*, ENCYCLOPAEDIA BRITANNICA ONLINE (2005), at <http://search.eb.com/eb/article?tocId=9071797>.

Third World countries often call behavior that harms them "terrorism." See, e.g., *Malaysia is Known in the World for its Voice of Reason and Justice*, BERNAMA, Oct. 29, 2003 (Mahathir said currency manipulation is "economic terrorism"); *Exactly What PM Was Saying*, NEW STRAITS TIMES-MANAGEMENT TIMES, Oct. 30, 2003 (Wiesenthal Centre call for boycott of Malaysia for supporting Mahathir's anti-Semitism is "economic terrorism" and "proves his point about the Jews"); Larry Rohter, *Brazil's Government-Elect Softens Talk of Big Change*, N.Y. TIMES, Nov. 30, 2002, at C3 (Mr. da Silva "repeatedly criticized what he called the 'economic terrorism' of 'speculators' who he said were trying to reap immoral windfall profits at Brazil's expense."); Clyde Haberman, *Lebanon Protests as Israel Blockades its Coast to 'Send a Message,'* N.Y. TIMES, Feb. 27, 1995, at A9 ("Rafik al-Hariri accused the Israelis of engaging in 'political, military and economic terrorism.'"); *We Should Tell US when it is Wrong*, NEW STRAITS TIMES-MANAGEMENT TIMES, Oct. 23, 2003 (Mahathir, interviewed on Indonesian television, compares economic devastation to terrorist devastation because it causes riots, concludes "economic terrorism is not different from other forms of terrorism"); Ali Akbar Velaytan, *Iranian Foreign Minister Attacks the U.S.*, N.Y. TIMES, Oct. 23, 1995, at A8 (criticizing economic sanctions as "the United States policy of economic terrorism against independent states"); Tim Shorrock, *Ex-Dissident Stirs Anger by Seeking End to U.S. Sanctions*, INTER PRESS SERVICE, Oct. 31, 2001 (former aide to Aung San Suu Kyi says of U.S. sanctions on Burma, "[t]his is economic terrorism. It won't bring economic change and won't even bring any positive change. It is so unfair and so cruel.").

204. See Alan Dershowitz, *Critics of Sheikh Yassin Killing Reveal Own Moral Blindness*, THE FORWARD, Mar. 26, 2004, available at <http://www.forward.com/main/article.php?ref=dershowitz200403241003>; see also Carlotta Gall & Eric Schmitt, *Shocked Afghans Criticize U.S. Strike; Toll Is Some 40 Dead and 100 Wounded*, N.Y. TIMES, July 3, 2002, at A3 (U.S., apparently targeting al Qaeda members, bombed wedding party).

205. See Greg Myre, *After Sheikh is Slain, Hamas Picks Fiery Figure as its Leader in Gaza*, N.Y. TIMES, Mar. 24, 2004, at A1; James Bennet, *Sharon's 'Big Bang,'* N.Y. TIMES, Apr. 18, 2004, at 6.

206. See *Washington pas prévenu de l'assassinat, dénonciations dans le monde*, Agence France-Presse, Apr. 18, 2004 ("Le chef de la diplomatie britannique Jack Straw a condamné

legal basis for these charges,<sup>207</sup> the essence of the complaints seemed to many in Israel to be that Israel could not defend its citizens<sup>208</sup> and most certainly should not think creatively in its dealings with the problem of terrorists surrounding themselves with civilians. The message was received loud and clear: no matter what you do, you cannot win.<sup>209</sup>

Whether this perception resulted in worse humanitarian conditions is a difficult empirical question. If there is not a difference in tactics used because of the impossibility of compliance, however, then the criticisms themselves presumably did not have any effect, except to the extent they drew attention to the situation, which attention affected Israeli behavior.<sup>210</sup>

## VI. CONCLUSION

Israel is a unique country, not only in its isolation<sup>211</sup> and insecurity,<sup>212</sup> but also in the way it strives to maintain a moral code,<sup>213</sup> and in which, particularly recently, it has come to value "enemy" lives in a way that the United States in Afghanistan and Iraq, for example, simply does not.<sup>214</sup> Israel has persisted in adhering to its own moral strictures, even as the world announces that she has lost her right to exist.<sup>215</sup> Certainly, in the

---

l'assassinat d'Abdelaziz al-Rantissi, estimant qu'il s'agissait d'une action 'illégal, injustifiée et contre-productive.'" The rest of the E.U. condemned the action as well.

Arab outrage took on "epic" proportions. See, e.g., Abdulwahab Badrakhan, *Licensed Assassination*, DAR AL HAYAT ENG., Apr. 19, 2004 (column expressing anger and bewilderment that the "U.S. does not seem to understand that Yassin, Rantissi and the other martyrs' terror is defense of their land and a resistance to the occupation," and comparing the assassinations to the movie "The Passion of the Christ," absolving the U.S. because it 'knows not what it does.'). But see Hazem Saghie, *More than 'Anger'*, DAR AL HAYAT ENG., Apr. 21, 2004 ("We are among the angry, not because Sheikh Ahmad Yassin and Dr. Abdulaziz Al Rantisi were assassinated, but primarily because of the dreadful, very dreadful situation which justice and rights have ended up in.") both available at <http://english.daralhayat.com/>.

207. See Dershowitz, *supra* note 204.

208. See Schiff, *supra* note 184.

209. *Id.*

210. Any close attention, however, could be expected to have the same effect, even without making legal judgments. See *supra* Part III.

211. Israel has diplomatic relations with only two of its neighbors, Egypt and Jordan. See Press Release, Isr. Ministry of Foreign Affairs, *Israel's Diplomatic Missions Abroad: Status of Relations*, Mar. 5, 2004, at <http://www.mfa.gov.il/MFA/About+the+Ministry/Diplomatic+missions/Israel-s%20Diplomatic%20Missions%20Abroad>.

212. *Supra* note 119.

213. *Supra* note 132.

214. See, e.g., discussion of Jenin, *supra* Part V.A.; see also Ford, *supra* note 55.

215. See Mortimer B. Zuckerman, *Graffiti on History's Walls*, 135:15 U.S. NEWS & WORLD REP. 44 (Nov. 3, 2003); Stanley Fish, *The Free Speech Follies*, CHRON. HIGHER ED., June 13, 2003, at 3 (citing statements by Tom Paulin); G.A. Res. 3379, *supra* note 160 (equating Zionism with racism); see also Andrew Norfolk, *Chief Rabbi Says Bigotry is Worst Since*

case of Israel, the abuse of international law for political purposes has not resulted in a complete disregard for humanitarian concerns. The occupation has produced a humanitarian disaster, but not as a result of the use of disproportionate force, as was the case in Chechnya and elsewhere. Still, the analysis laid out in Part III, and brought out again at the end of Part V, makes sense: if international legal criticism is meant to affect incentives, it must leave a path for the targeted State to take without failing to protect its citizens.

The question remains, however, as more countries are threatened by global terrorism, what the role of international law in diplomacy should be. Should it be a dispassionate, apolitical interpretation of passionate, political texts? Should it be a European regulatory regime in which every detail of military action is regulated, as if armies were telecoms? Should it ban all objectionable behavior, failing to recognize a hierarchy of rights, a balancing of competing evils? Should it purport to ban war, even though no mechanism is capable of enforcing that? Or should it operate within the world in which we live, trying to alleviate suffering, promoting peace where possible, and avoiding atrocities where war is inevitable?

I profoundly hope that international law takes this last path. Aspirational laws have their place, but if international lawmaking turns into a non-governmental campaign to pass only aspirational laws, if those laws are then used as a club with which to beat well-meaning nations—while the worst human rights abusers not only escape reprimand, they sometimes chair the Human Rights Commission—international law will lose its legitimacy, at least in the countries it has unjustly targeted. These are the places where it needs legitimacy. It is ironic that international law's lack of enforcement structure made States acquiesce to all sorts of rules restricting their behavior, and now those very restrictions are part of the reason that they fight against an effective enforcement structure.<sup>216</sup>

So if you want to kill international law, bring out the NGOs and the States without meaningful armies, the States that do not face terrorist threats and those who brutally suppress them, and let them make a series of rules that, at least in times of danger, no one will obey. Rogue States

---

Nazis, *TIMES* (London), Mar. 1, 2002, at "Home News"; Adel Darwish, *Arab Outrage*, *TIMES* (London), Apr. 19, 2002, at "Features;" Tony Judt, *Israel: the Alternative*, 50:16 N.Y. REV. BOOKS, OCT. 23, 2003 ("Israel . . . is an anachronism"), available at <http://www.nybooks.com/articles/16671>. Israel is the only country whose "right to exist" is discussed with any frequency.

216. On U.S. objections to the ICC, see Remigius Chibueze, *United States Objection to the International Criminal Court*, 9 ANN. SURV. INT'L & COMP. L. 19 (2003); John Seguin, *Denouncing the International Criminal Court*, 18 B.U. INT'L L.J. 85 (2000).

benefit from having laws on the books that are not obeyed by others, because it gives them a defense when they act illegally.

Instead, let us ground the law not only in abstract justice, but in reality as well. Let us insist that the operation of no law should serve to deny a State the right to protect its citizens against those who do not follow the same rules. Let us insist that rules have goals and that they achieve them—and hamstringing national armies to aid “liberation” guerillas and terrorists is not a worthy goal in a world where colonial conflicts have ended,<sup>217</sup> and only national conflicts remain. Let us give States the tools they need to quash the terrorist threat and protect their own citizens, while giving them meaningful, realistic guidance to protect those civilians who might otherwise suffer as a result of those defensive actions.

The terrorist threat is real and it is growing. States will try to protect their citizens and many will do so militarily. If international law is not to go the way of the League of Nations, it must be effective not only as a curb, but also as a tool. International law must adapt to the realities we face, so that it may remain legitimate and viable; so that States are not forced to reject it; so that we do not return to the horrors of Dresden or Nanking; so the terrorists do not win.

---

217. See BEDERMAN, *supra* note 7, at 5 (“by the 1980’s there remained no part of the world that was under unwilling colonial domination by Europeans”).